Supreme Court, U.S.
FILED
051439 MAY 9 - 2006
OFFICE OF THE CLERK

No. 05-

IN THE

Supreme Court of the United States

MARY DEROCHE and ERIC DEROCHE,

Petitioners,

v.

ARIZONA INDUSTRIAL COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ALLAN D. NEWDELMAN
ROBERTA J. SUNKIN
ALAN D. NEWDELMAN, P.C.
80 East Columbus Avenue
Phoenix, Arizona 85012
(602) 264-4550

G. ERIC BRUNSTAD, JR.
Counsel of Record
RHEBA RUTKOWSKI
WILLIAM C. HEUER
PETER TOLSDORF
BINGHAM MCCUTCHEN LLP
One State Street
Hartford, Connecticut 06103
(860) 240-2700

Counsel for Petitioners

QUESTION PRESENTED

An Arizona statute directs that Petitioners are entitled to recover their attorneys' fees from Respondent (a state agency) following Respondent's unsuccessful action against Petitioners litigated in the federal bankruptcy court. Adhering to its prior decision in *Fobian v. Western Farm Credit Bank (In re Fobian)*, 951 F.2d 1149 (9th Cir. 1991), the Ninth Circuit held that, notwithstanding the Arizona statute, Petitioners could *not* recover their attorneys' fees from Respondent because the issues litigated in the bankruptcy court involved questions of federal bankruptcy law. The court reasoned that, as a matter of general federal common law, a party may not recover its attorneys' fees pursuant to a contract or state statute where the issues litigated involve matters of federal law because only federal law may authorize such a recovery. In other words, the Ninth Circuit held that a State cannot direct that its own agency may be liable to an opposing party for attorneys' fees incurred in the agency's unsuccessful litigation of federal issues. The question presented is:

Should the Court grant certiorari to resolve a conflict among nine courts of appeals concerning the question whether a litigant may recover attorneys' fees under a contract or state statute where the issues litigated involve matters of federal bankruptcy law?

RULE 29.6 STATEMENT AND THE PARTIES TO THE PROCEEDINGS

Petitioners are Mary DeRoche and Eric DeRoche, each in their individual capacities. Respondent is the Arizona Industrial Commission, an agency of the State of Arizona.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

PRELIMINARY STATEMENT 1

OPINIONS BELOW 4

JURISDICTION 4

RELEVANT PROVISIONS OF LAW 4

STATEMENT OF THE CASE 4

A. The Bankruptcy Case And The Commission's Claim 4

B. The DeRoches' Claim For Attorneys' Fees 5

C. Disposition By The Court of Appeals 6

REASONS FOR GRANTING THE WRIT 6

A. The Ninth Circuit's Decision Deepens A Square Circuit Conflict 7

B. The Decision Below Conflicts With This Court's Precedents And Is Plainly Incorrect 12

CONCLUSION 15

TABLE OF AUTHORITIES

CASES

Alport v. Ritter (In re Alport), 144 F.3d 1163 (8th Cir. 1998) 2, 9

Alvarado v. Walsh (In re LCO Enters., Inc.), 105 F.3d 665 (9th Cir. 1997) 7

Aleyska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975) 12

Atherton v. FDIC, 519 U.S. 213 (1997) 13, 14

BankBoston, N.A. v. Sokolowski (In re Sokolowski), 205 F.3d 532 (2d Cir. 2000) 2, 8

In re Best Prods. Co., 148 B.R. 413 (Bankr. S.D.N.Y. 1992) 11

Burns v. Great Lakes Higher Ed. Corp. (In re Burns), 3 Fed. Appx. 689 (10th Cir. 2001) 2, 8

Cadle Co. v. Martinez (In re Martinez), 416 F.3d 1286 (11th Cir. 2005) 2, 9

Camilli v. Industrial Comm'n of Ariz., 94 F.3d 1330 (9th Cir. 1996) 5

In re Child World, Inc., 161 B.R. 349 (Bankr. S.D.N.Y. 1993) 11

Collingwood Grain, Inc. v. Coast Trading Co., Inc., 744 F.2d 68 (9th Cir. 1984) 7

Commercial Factors of Salt Lake City v. Jensen (In re Jensen), 113 B.R. 51 (Bankr. D. Utah 1990) 11

In re Crown Books Corp., 269 B.R. 12 (Bankr. D. Del. 2001) 11

Davidson v. Davidson (In re Davidson), 947 F.2d 1294 (5th Cir. 1991) 2, 9

DeRoche v. Arizona Indus. Comm. (In re DeRoche), 287 F.3d 751 (9th Cir. 2002) 5

DeRoche v. Arizona Indus. Comm. (In re DeRoche), 434 F.3d 1188 (9th Cir. 2006) 4

In re Fast, 318 B.R. 183 (Bankr. D. Colo. 2004) 11

FCC v. NextWave Pers. Communications, Inc., 537 U.S. 293 (2003) 14

Fleischmann Distilling Corp. v. Maier Brewing Co., 286 U.S. 714 (1967) 12

Fobian v. Western Farm Credit Bank (In re Fobian), 951 F.2d 1149 (9th Cir. 1991) ..... *passim*

Ford v. Baroff (In re Baroff), 105 F.3d 439 (9th Cir. 1997) 7

In re Hunter, 203 B.R. 150 (Bankr. W.D. Ark. 1996) 11

James R. Barnard, D.D.S., Inc. v. Silva (In re Silva), 125 B.R. 28 (Bankr. C.D. Cal. 1991) 11

Johnson v. Righetti (In re Johnson), 756 F.2d 738 (9th Cir. 1985) 7, 12

Jordan v. Southeast Nat'l Bank (In re Jordan), 927 F.2d 221 (5th Cir. 1991) 2, 9

Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90 (1991) 14

Martin v. Bank of Germantown (In re Martin), 761 F.2d 1163 (6th Cir. 1985) 2, 3, 9

In re Martinez, 416 F.3d 1286 (11th Cir. 2005) 10, 11

Ohio v. Kovacs, 469 U.S. 274 (1985) 14

O'Melveny & Myers v. FDIC, 512 U.S. 79 (1994) 3, 13, 14

Renfrow v. Draper, 232 F.3d 688 (9th Cir. 2000) 2, 7

In re Ryan's Subs, Inc., 165 B.R. 465 (Bankr. W.D. Mo. 1994) 11

Security Mortgage Co. v. Powers, 278 U.S. 149 (1928) 3, 8, 12, 13

In re Sheridan, 105 F.3d 1164 (7th Cir. 1997) 2, 9

Stenga v. 4M 2B Investors (In re 4M 2B Investors), 116 F.3d 483 (9th Cir. 1997) 7

Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981) 13

Three Sisters Partners LLC v. Harden (In re Shangra-La, Inc.), 167 F.3d 843 (4th Cir. 1999) 2, 9, 10

Thrifty Oil Co. v. Bank of Am. Nat'l Trust & Sav. Assoc., 322 F.3d 1039 (9th Cir. 2003) 7

Toibb v. Radloff, 501 U.S. 157 (1991) 14

Transouth Fin. Corp. of Fl. v. Johnson, 931 F.2d 1505 (11th Cir. 1991) 2, 9

United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979) 14

V.M. v. S.S. (In re S.S.), 271 B.R. 240 (Bankr. D. N.J. 2002) 11

Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63 (1966) 13

Wheeldin v. Wheeler, 373 U.S. 647 (1963) 13

Worthen Bank & Trust Co. v. Morris (In re Morris), 602 F.2d 826 (8th Cir. 1979) 9

STATUTES AND RULES

11 U.S.C. § 506 8

11 U.S.C. § 507(a)(8)(E)(ii) 4, 5

11 U.S.C. § 523(a)(1)(A) 4, 5

11 U.S.C. § 1225 8

28 U.S.C. § 1254(1) 4

Ariz. Rev. Stat. § 12-348 ..... 1, 4, 5, 14, 15

MISCELLANEOUS

4 COLLIER ON BANKRUPTCY, ¶ 506.04[3][a] (15th ed. 2006).. 2

H. Hart & H. Wechsler, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 435 (1953)..... 13

PRELIMINARY STATEMENT

This matter arises out of the joint chapter 7 bankruptcy case of Petitioners Mary DeRoche and Eric DeRoche (collectively, the "DeRoches"). Respondent is the Arizona Industrial Commission (the "Commission"), an agency of the State of Arizona.

During the course of the DeRoches' bankruptcy proceeding, the Commission pursued civil litigation in the bankruptcy court seeking a determination that the Commission's claim against the DeRoches constituted a priority, non-dischargeable debt -- meaning that the obligation should be paid ahead of other claims against the DeRoches, and that the DeRoches should continue to be responsible for the obligation notwithstanding their general discharge in bankruptcy. After the Commission was unsuccessful in the litigation, the DeRoches sought to recover from the Commission, pursuant to Arizona Revised Statutes § 12-348, their attorneys' fees incurred in defending the litigation. Section 12-348 directs that, if the State of Arizona (including one its agencies) is unsuccessful in litigation brought against a party, the party shall recover its attorneys' fees from the State (or agency). *See* Ariz. Rev. Stat. § 12-348.

Adhering to its prior decision in *Fobian v. Western Farm Credit Bank (In re Fobian)*, 951 F.2d 1149 (9th Cir. 1991), the Ninth Circuit held as a matter of general federal common law that, notwithstanding section 12-348, Petitioners could *not* recover their attorneys' fees from the Commission because the priority and non-dischargeability issues litigated in the bankruptcy court were questions of federal bankruptcy law. The Ninth Circuit concluded that state law cannot "create a new federal right of attorney fee recovery in this context," Pet. App. 8a, and that, because federal law does not independently validate the state rule, "attorneys' fees are not available for litigating federal bankruptcy issues," Pet. App. 2a. In other words, the Ninth Circuit held that, even if a litigant has a general right to attorneys' fees under applicable state law, either by virtue of a contract valid under state law or by virtue of a state statute, the

litigant's general right to fees cannot extend to fees incurred in litigating bankruptcy issues because federal law does not *authorize* such a recovery. Significantly, no federal statute directs or requires this result. Instead, the court simply applied its rule as a matter of general federal common law.

Three other courts of appeals apply the *Fobian* rule in the context of litigating bankruptcy issues and have denied any right to attorneys' fees. *See Burns v. Great Lakes Higher Ed. Corp. (In re Burns)*, 3 Fed. Appx. 689, 691 (10th Cir. 2001) (unpublished); *BankBoston, N.A. v. Sokolowski (In re Sokolowski)*, 205 F.3d 532, 535 (2d Cir. 2000); *In re Sheridan*, 105 F.3d 1164, 1166-68 (7th Cir. 1997).

In contrast, five courts of appeals reject the *Fobian* analysis and allow the recovery of attorneys' fees in the context of litigating federal bankruptcy issues if allowed under applicable contract law or state statute. *See Cadle Co. v. Martinez (In re Martinez)*, 416 F.3d 1286, 1290-91 (11th Cir. 2005) (rejecting Seventh Circuit's decision in *Sheridan* and Ninth Circuit's *Fobian* analysis as applied in *Renfrow v. Draper*, 232 F.3d 688, 694 (9th Cir. 2000)); *Three Sisters Partners LLC v. Harden (In re Shangra-La, Inc.)*, 167 F.3d 843, 848 (4th Cir. 1999) (rejecting *Fobian*, concluding that it "inappropriately focuses on the presence of issues peculiar to bankruptcy law, rather than on whether the attorneys' fees are properly taken in furtherance of the [relevant contract] and applicable state law"); *Alport v. Ritter (In re Alport)*, 144 F.3d 1163, 1168 (8th Cir. 1998) (rejecting *Fobian*); *Davidson v. Davidson (In re Davidson)*, 947 F.2d 1294, 1298 (5th Cir. 1991) (allowing fees); *Transouth Fin. Corp. of Fl. v. Johnson*, 931 F.2d 1505, 1507-9 (11th Cir. 1991) (allowing fees); *Jordan v. Southeast Nat'l Bank (In re Jordan)*, 927 F.2d 221, 226-27 (5th Cir. 1991) (allowing fees); *Martin v. Bank of Germantown (In re Martin)*, 761 F.2d 1163, 1168 (6th Cir. 1985) (allowing fees).

The conflict among the circuits is specifically recognized in the leading treatise on bankruptcy law, which criticizes *Fobian*. *See* 4 COLLIER ON BANKRUPTCY, ¶ 506.04[3][a] (15th ed. 2006) (discussing *Fobian* and stating that "[o]ther courts [of appeals]

have expressly rejected *Fobian*, and properly concluded that a claim for attorney's fees arising in the context of litigating bankruptcy issues must be allowed if valid under applicable state law") (citations omitted).

As recognized by several courts of appeals, the *Fobian* rule conflicts with prior precedents of this Court, which have concluded that the question of attorneys' fees is a matter of state, rather than federal, law. *See Security Mortgage Co. v. Powers*, 278 U.S. 149, 154 (1928) (concluding that the determination of a claim for attorneys' fees in bankruptcy presents "a question of local law"); *In re Martin*, 761 F.2d at 1168 (following *Security Mortgage* and concluding that creditor was entitled to fees).

The issue presented is important and recurring. The conflict among the courts of appeals is longstanding, widespread, entrenched, and unlikely to resolve itself absent intervention by this Court. This case presents an ideal vehicle to resolve the conflict because the court of appeals resolved the matter by applying the *Fobian* rule exclusively as an issue of law, and the resolution of the question presented is outcome-determinative. Finally, the decision below is plainly erroneous. According to the holding in this case, a State is barred from directing that its own agency must pay an opposing party's attorneys' fees when the agency engages in unsuccessful litigation against the party in a federal bankruptcy court and the litigation involves federal issues. The *Fobian* rule is plainly contrary to this Court's preemption precedents. *See O'Melveny & Myers v. FDIC*, 512 U.S. 79, 83, 87-88 (1994) (stating that "[t]here is no federal general common law" and that there must be a "significant conflict between some federal policy or interest and the use of state law . . . as a precondition for recognition of a federal rule of decision" in order to avoid becoming "awash in 'federal common-law' rules") (citations omitted). Accordingly, the DeRoches respectfully request that the Court issue a writ of certiorari.

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a, is reported at 434 F.3d 1188 (2006). The opinion of the district court, Pet. App. 10a, is unpublished, as is the opinion of the bankruptcy court, Pet. App. 15a.

JURISDICTION

The court of appeals entered its decision on January 17, 2006. The court of appeals denied Petitioners' timely petition for rehearing, Pet. App. 20a, on February 8, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The following statutory provisions are relevant to this petition:[1] 11 U.S.C. §§ 507(a)(8)(E)(ii); 523(a)(1)(A); and Ariz. Rev. Stat. § 12-348. No provision of the Bankruptcy Code bars a debtor in bankruptcy from recovering its attorneys' fees from a State or one of its agencies in matters involving the litigation of federal bankruptcy issues.

STATEMENT OF THE CASE

A. The Bankruptcy Case And The Commission's Claim

On November 28, 1994, Eric and Mary DeRoche commenced their chapter 7 bankruptcy case in the United States Bankruptcy Court for the District of Arizona. Thereafter, the Commission filed a proof of claim with the bankruptcy court asserting a debt of $22,421.52 for workers' compensation benefits that the Commission had paid to an injured individual formerly employed by Mr. DeRoche. The Commission claimed that this debt was entitled to priority treatment in the DeRoches' bankruptcy case under section 507(a)(8)(E)(ii) of the Bankruptcy

---

[1] The pertinent text of these provisions is reproduced in Petitioners' Appendix. *See* Pet. App. 21a.

Code, and also that the claim was non-dischargeable under section 523(a)(1)(A) of the Code. *See* 11 U.S.C. §§ 507(a)(8)(E)(ii); 523(a)(1)(A); *see also Camilli v. Industrial Comm'n of Ariz.*, 94 F.3d 1330 (9th Cir. 1996) (certain claims for workers' compensation payments that satisfy certain criteria are properly priority, non-dischargeable obligations in bankruptcy). On January 23, 1995, the DeRoches objected to the Commission's claim. On March 17, 1995, the bankruptcy court granted the DeRoches a general discharge of their debts, except for the pending dispute with the Commission.

For more than seven years, the parties litigated the priority and non-dischargeability issues in the federal bankruptcy and district courts. The bankruptcy court ruled in favor of the Commission, and the DeRoches appealed to the United States District Court for the District of Arizona. The district court affirmed. On further appeal, however, the Ninth Circuit reversed, concluding that the Commission's claim was not entitled to priority treatment, and was dischargeable. *See DeRoche v. Arizona Indus. Comm'n (In re DeRoche)*, 287 F.3d 751 (9th Cir. 2002). Thereafter, the bankruptcy court entered an order sustaining the DeRoches' objection to the Commission's claim and determining that the debt was discharged.

B. The DeRoches' Claim For Attorneys' Fees

The DeRoches incurred substantial attorneys' fees in seven years of litigation with the Commission. On August 7, 2002, the DeRoches filed with the bankruptcy court an application for payment of their attorneys' fees and costs (the "Application"), requesting $33,644.47 from the Commission pursuant to Arizona Revised Statute § 12-348. The Commission objected to the Application, asserting that, under Ninth Circuit precedent including *Fobian v. Western Farm Credit Bank (In re Fobian)*, 951 F.2d 1149 (9th Cir. 1991), attorneys' fees could not be awarded because the issues litigated were questions of federal bankruptcy law.

On January 22, 2003, the bankruptcy court denied the Application, and the DeRoches timely appealed the denial to the

district court, which affirmed. Thereafter, the DeRoches further appealed to the Ninth Circuit, which also affirmed.

C. Disposition By The Court of Appeals

In the decision below, the Ninth Circuit recognized that "[i]t is the general rule in the United States that in the absence of legislation providing otherwise, litigants must pay their own attorneys fees" and noted that "Congress has provided only limited exceptions to this rule under selected statutes granting or protecting various federal rights." Pet. App. 4a (internal quotation marks and citations omitted). The Ninth Circuit explained that, beyond those exceptions enacted by Congress are those that exist under state law: "[E]xceptions to the general rule [are] proceedings based on a contract enforceable under state law or statute." *Id.* Adhering to its own prior precedents (including *Fobian*), the court stated that attorneys' fees are recoverable in bankruptcy cases in the Ninth Circuit only "if state law governs the substantive issues raised in the proceedings." *Id.* (internal quotation marks and citations omitted). The Ninth Circuit concluded: "Our clear rule is that no fees are available under state law for litigation of substantive federal bankruptcy issues in bankruptcy court." *Id.*

REASONS FOR GRANTING THE WRIT

The petition for a writ of certiorari should be granted because the decision below deepens an entrenched split among the courts of appeals. In denying the DeRoches' claim for attorneys' fees, the Ninth Circuit followed its longstanding decision in *Fobian v. Western Farm Credit Bank (In re Fobian)*, 951 F.2d 1149 (9th Cir. 1991), to hold that a party cannot pursue a state law right to attorneys' fees if the issues litigated involve questions of federal law, unless federal law authorizes the party's right. Three other courts of appeals also apply the *Fobian* rule in the context of litigating bankruptcy matters. In contrast, five courts of appeals reject the *Fobian* analysis and allow the recovery of attorneys' fees in the context of litigating federal bankruptcy issues if allowed under applicable state contract law

or state statute. Intervention by this Court is required because the conflict among the courts of appeals is longstanding, widespread, entrenched, and unlikely to resolve itself on its own.

The Court's intervention also is warranted because the issue presented is an important and recurring problem. Moreover, as recognized by several courts of appeals, the *Fobian* rule conflicts with prior precedents of this Court, in which the Court has concluded in the bankruptcy context that the question of attorneys' fees is a matter of state, rather than federal, law.

This case presents an ideal vehicle to resolve the conflict because the court below resolved the matter applying the *Fobian* rule exclusively as an issue of law, and resolution of the question presented is outcome-determinative. Finally, the decision of the court below is demonstrably in error. A State has the right to direct by statute that one of its own agencies is liable for attorneys' fees in pursuing unsuccessful litigation against a private party. Where, as here, no federal statute directs otherwise, the Ninth Circuit plainly erred in applying a rule of general federal common law to thwart the State's direction. Accordingly, the DeRoches' respectfully request that the Court issue a writ of certiorari.

A. The Ninth Circuit's Decision Deepens A Square Circuit Conflict.

In concluding that the DeRoches' claim for attorneys' fees must be denied, the Ninth Circuit adhered to its decision in *In re Fobian*, 951 F.2d 1149 (9th Cir. 1991), holding that attorneys' fees are not recoverable for litigating federal bankruptcy issues. The Ninth Circuit has followed the *Fobian* rule in numerous cases. *See. e.g., Renfrow v. Draper*, 232 F.3d 688 (9th Cir. 2000); *Ford v. Baroff (In re Baroff)*, 105 F.3d 439 (9th Cir. 1997); *see also Thrifty Oil Co. v. Bank of Am. Nat'l Trust & Sav. Assoc.*, 322 F.3d 1039, 1059-60 (9th Cir. 2003); *Stenga v. 4M 2B Investors (In re 4M 2B Investors)*, 116 F.3d 483 (9th Cir. 1997) (unpublished); *Alvarado v. Walsh (In re LCO Enters., Inc.)*, 105 F.3d 665 (9th Cir. 1997) (Table); *Johnson v. Righetti (In re Johnson)*, 756 F.2d 738, 740-41 (9th Cir. 1985); *Collingwood*

Grain, Inc., v. Coast Trading Co., Inc., 744 F.2d 686, 693 (9th Cir. 1984).

In *Fobian*, the debtors filed for bankruptcy relief after defaulting on mortgage debt to a secured creditor. In the bankruptcy proceeding, the creditor sought to protect and defend its rights under sections 506 and 1225 of the Bankruptcy Code (which governed the treatment of the secured creditor's claim). The creditor incurred attorneys' fees pursuing its rights under these statutory provisions and claimed that it was entitled to its fees under the terms of its contractual loan agreement. Observing that the application of sections 506 and 1225 are matters of federal law, the Ninth Circuit concluded that any right to attorneys' fees incurred in connection with litigating the proper application of these provisions is also a matter of federal law, regardless of the applicability of the underlying provisions of the contract. The court stated: "[W]here the litigated issues involve not basic contract enforcement questions, but issues peculiar to federal bankruptcy law, attorneys' fees will not be awarded absent bad faith or harassment by the losing party." 951 F.2d at 1153.

Under *Fobian*, private parties are prohibited from contractually allocating the burden of attorneys' fees between them unless federal law authorizes the agreement. In other words, *Fobian* holds that contracts otherwise valid under state law (such as mortgage loan agreements, sales contracts, and the like) cannot, as a matter of law, allocate responsibility for a party's litigation expenses unless Congress has expressly *authorized* the allocation in some manner. This rule is plainly wrong and has the analysis exactly backwards. Clearly, the correct rule is that contracts that are valid under state law may allocate litigation costs among the parties unless Congress has expressly *prohibited* them from doing so. *See Security Mortgage*, 278 U.S. at 154. Nevertheless, three other courts of appeals -- the Second, Seventh, and Tenth -- apply the *Fobian* rule. *See Burns v. Great Lakes Higher Ed. Corp. (In re Burns)*, 3 Fed. Appx. 689, 691 (10th Cir. 2001) (unpublished); *BankBoston, N.A. v. Sokolowski (In re Sokolowski)*, 205 F.3d

532, 535 (2d Cir. 2000); *In re Sheridan*, 105 F.3d 1164, 1166-68 (7th Cir. 1997).

In contrast, five courts of appeals -- the Fourth, Fifth, Sixth, Eighth, and Eleventh -- focusing in particular on this Court's decisions, follow the rule that creditors may recover fees incurred in litigating federal bankruptcy issues. *See Cadle Co. v. Martinez (In re Martinez)*, 416 F.3d 1286, 1290-91 (11th Cir. 2005); *Alport v. Ritter (In re Alport)*, 144 F.3d 1163, 1168 (8th Cir. 1998); *Three Sisters Partners LLC v. Harden (In re Shangra-La, Inc.)*, 167 F.3d 843, 848 (4th Cir. 1999); *Davidson v. Davidson (In re Davidson)*, 947 F.2d 1294, 1298 (5th Cir. 1991); *Transouth Fin. Corp. of Fl. v. Johnson*, 931 F.2d 1505, 1507-9 (11th Cir. 1991); *Jordan v. Southeast Nat'l Bank (In re Jordan)*, 927 F.2d 221, 226-27 (5th Cir. 1991); *Martin v. Bank of Germantown (In re Martin)*, 761 F.2d 1163, 1168 (6th Cir. 1985); *Worthen Bank & Trust Co. v. Morris (In re Morris)*, 602 F.2d 826, 829-30 (8th Cir. 1979).

For example, in *In re Martin*, 761 F.2d 1163 (6th Cir. 1985), the debtor executed a loan agreement granting the creditor the right to recover attorneys' fees incurred in collecting the loan. After the debtor filed for bankruptcy relief, the creditor objected to the debtor's bankruptcy discharge (plainly an issue of bankruptcy law) and sought attorneys' fees in connection with collecting its loan in the bankruptcy court and challenging the discharge of the debtor. Following this Court's decision in *Security Mortgage*, the Sixth Circuit concluded that the creditor held a valid claim for its fees. 761 F.2d at 1168.

In *Three Sisters Partners LLC v. Harden (In re Shangra-La, Inc.)*, 167 F.3d 843 (4th Cir. 1999), the debtor executed a lease obligating it to pay the lessor's attorneys' fees in connection with the lessor's pursuit of its rights. After the debtor filed for bankruptcy, the lessor incurred attorneys' fees in connection with its efforts to recover its property and protect its interests by seeking relief under various provisions of the Bankruptcy Code and actively participating in the case. After the debtor "assumed" the lease (i.e., agreed to be bound by its terms notwithstanding its bankruptcy filing and its right to reject the

lease), the lessor sought to recover its fees. The bankruptcy court denied recovery, reasoning on the basis of *Fobian* that the lessor could not recover fees for protecting its interests in the bankruptcy court or litigating bankruptcy issues. The Fourth Circuit reversed, holding that "the bankruptcy court erred to the extent that it applied a bright-line test precluding the award of fees for actions primarily involving issues of bankruptcy law." *Shangra-La*, 167 F.3d at 852. In doing so, the Fourth Circuit expressly rejected and criticized *Fobian*, stating that the Ninth Circuit's rule "inappropriately focuses on the presence of issues peculiar to bankruptcy law, rather than on whether the attorney's actions were reasonably undertaken in furtherance of purposes for which attorney's fees are properly recoverable under the terms of the [relevant contract] and applicable state law." *Shangra-La*, 167 F.3d at 848.

In *In re Martinez*, 416 F.3d 1286 (11th Cir. 2005), the debtor sought to recover its attorney's fees pursuant to a combination of the parties' contract and a Florida statute. Under the terms of the contract, the creditor was granted the right to recover attorneys' fees in enforcing the contract, but the debtor was not. *Id.* at 1288. However, pursuant to the particular state statute, contractual provisions for attorneys' fees could not be "one-sided," and all such provisions were deemed to be applicable to both parties. *Id.* at 1288-89. The litigation in *In re Martinez* involved matters of bankruptcy law (the dischargeability of a debt), and no federal statute provided for the debtor's recovery of attorneys' fees. Nevertheless, the debtor was able to recover its attorneys' fees, based upon the state statute. *Id.* at 1290-91. In reaching this conclusion, the Eleventh Circuit stated:

> Here, the debtor prevailed, and there was a contractual right to attorney's fees under the "Business Note and Security Agreement" contract between the debtor and creditor when it is read in light of [sic] Florida's attorney's fee reciprocity statute, which was incorporated into the contract by operation of law. This award of attorney's fees is without regard to whether "state law issues" were "actually litigated" in the

> bankruptcy dischargeability proceedings because the recoverability of attorney's fees and costs under the facts and circumstances of this case is afforded by a matter of contract. To deny a debtor attorney's fees and costs for prevailing in a dischargeability proceeding brought by a creditor, where those same fees would have been available under state contract law for the creditor had it prevailed, would contravene the primary purpose of the bankruptcy statute, which is "to relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh."

Id. (citations omitted).

In addition to the conflict among the courts of appeals on the question presented, numerous lower courts have also adopted conflicting positions. *See, e.g., In re Fast*, 318 B.R. 183, 192-94 (Bankr. D. Col. 2004) (allowing claim for attorneys' fees); *V.M. v. S.S. (In re S.S.)*, 271 B.R. 240, 244-46 (Bankr. D. N.J. 2002) (noting that claim, if properly presented, would be disallowed); *In re Crown Books Corp.*, 269 B.R. 12, 15-18 (Bankr. D. Del. 2001) (allowing recovery of attorneys' fees); *In re Hunter*, 203 B.R. 150, 151 (Bankr. W.D. Ark. 1996) (allowing recovery of attorneys' fees); *In re Ryan's Subs, Inc.*, 165 B.R. 465, 468-69 (Bankr. W.D. Mo. 1994) (disallowing claim for attorneys' fees); *In re Child World, Inc.*, 161 B.R. 349, 353-55 (Bankr. S.D.N.Y. 1993); *In re Best Prods. Co.*, 148 B.R. 413, 414-15 (Bankr. S.D.N.Y. 1992) (disallowing claim for attorneys' fees); *James R. Barnard, D.D.S., Inc. v. Silva (In re Silva)*, 125 B.R. 28, 30-32 (Bankr. C.D. Cal. 1991) (allowing recovery of attorneys' fees); *Commercial Factors of Salt Lake City v. Jensen (In re Jensen)*, 113 B.R. 51, 53-55 (Bankr. D. Utah 1990) (allowing recovery of attorneys' fees).

It is unlikely that the existing conflict among the courts of appeals on the question presented will resolve itself. The conflict is longstanding, widespread, and entrenched. Because the relevant issues have been fully vetted in numerous published opinions, it is also unlikely that allowing the conflict to continue will shed further light on how the question presented should be

resolved. Accordingly, the DeRoches respectfully request that the Court issue a writ of certiorari in this case.

B. The Decision Below Conflicts With This Court's Precedents And Is Plainly Incorrect.

In *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 286 U.S. 714 (1967), this Court stated that the general rule in the United States "has long been that attorney's fees are not ordinarily recoverable *in the absence of a statute* or enforceable contract providing therefor." *Id.* at 717 (emphasis supplied); *see also Aleyska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975). While this Court has thus concluded that state statutes or contracts governed by state law may provide a valid basis for claiming attorneys' fees, the rule followed by the Ninth Circuit is plainly to the contrary and thus conflicts with the precedents of this Court.

As noted, the analysis and holdings of *Fobian* and its progeny rest on the proposition that, in litigation involving federal bankruptcy issues, the parties' contractual allocation of liability for attorneys' fees is invalid unless authorized by *federal* law. *See, e.g., Fobian*, 951 F.2d at 1153; *Johnson*, 756 F.2d at 741 (stating that "because federal [bankruptcy] law governs the disposition of this [bankruptcy question], it should also govern the disposition of the attorney's fee issue in this case" and concluding that, because no federal statute authorized recovery of attorneys' fees, the fees were not recoverable). As this Court has explained in the bankruptcy context, however, questions regarding a party's right to attorneys' fees is a matter of *state* law, and, thus, the Ninth Circuit has the analysis exactly backwards.

In the bankruptcy setting, this Court determined long ago that, "[t]he construction of the contract for attorney's fees presents . . . a question of local law." *Security Mortgage*, 278 U.S. at 154. The Court acknowledged in *Security Mortgage* that bankruptcy law *might* bar the enforceability of an entitlement to attorneys' fees against the debtor's property otherwise valid under state law in so far as Congress has the authority to enact

such a rule preempting state law. *Id.* Critically, however, the Court found that bankruptcy law, in and of itself, does *not* actually present any such bar: "The character of the obligation to pay attorney's fees presents no obstacle to enforcing it in bankruptcy, either as a provable claim or by way of a lien on specific property." *Id.*

The Ninth Circuit's *Fobian* rule amounts to "what one might call 'federal common law' in the strictest sense, *i.e.*, a rule of decision that amounts, not to simply an interpretation of a federal statute or a properly promulgated administrative rule, but, rather, to the judicial 'creation' of a special federal rule of decision." *Atherton v. FDIC*, 519 U.S. 213, 218 (1997) (citing *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640-43 (1981)). But under this Court's precedents, there simply is no basis for the creation of federal common law governing the ability of parties to enter into contracts allocating the burden of attorneys' fees in litigation involving federal bankruptcy issues.

The creation of a new federal common law rule of decision is justified in only the rarest of circumstances:

> The Court has said that "cases in which judicial creation of a special federal rule would be justified . . . are . . . 'few and restricted.'" *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994) (quoting *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963)). "Whether latent federal power should be exercised to displace state law is primarily a decision for Congress," not the federal courts. *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966). Nor does the existence of related federal statutes automatically show that Congress intended courts to create federal common-law rules, for "'Congress acts . . . against the background of the total *corpus juris* of the states . . . .'" *Id.* at 68 (quoting H. Hart & H. Wechsler, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 435 (1953)). Thus, normally, when courts decide to fashion rules of federal common law, "the guiding principle is that a significant conflict between some federal policy or interest and the use of state law . . . must first be

> specifically shown." 384 U.S., at 68. Indeed, such a "conflict" is normally a "precondition." *O'Melveny, supra*, at 87. *See also United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979); *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98 (1991).

Atherton, 519 U.S. at 218-19.

In *Atherton*, the Court noted that "[n]o one doubts the power of Congress to legislate rules for deciding cases," but recognized that none of the relevant statutes enacted by Congress actually provided a rule of decision, which, in that case, involved the applicable standard of care by which a party's conduct would be judged. 519 U.S. at 219. Acknowledging the absence of a federal standard, the Court remarked: "Consequently, we must decide whether the application of state-law standards of care . . . would conflict with, and thereby significantly threaten, a federal policy or interest." *Id.* Finding no such conflict, the Court allowed the state law standard to be applied. *Id.* Likewise, in this case there is no conflict between state and federal law and the decision of the Ninth Circuit cannot stand.

Had Congress intended to create an exception to the allowance of claims for attorneys' fees by prohibiting claims for attorneys' fees incurred in pursuing, protecting, or defending rights in the context of a bankruptcy case because federal bankruptcy issues are involved, it could easily have done so. The fact that Congress did not create such an exception demonstrates conclusively that it intended no such exception to apply. *See FCC v. NextWave Pers. Communications, Inc.*, 537 U.S. 293, 302 (2003) ("where Congress has intended to provide . . . exceptions to provisions of the Bankruptcy Code, it has done so clearly and expressly"); *Toibb v. Radloff*, 501 U.S. 157, 161 (1991) (refusing to infer exception to section 109 of the Bankruptcy Code, stating, "Congress knew how to restrict recourse to the avenues of bankruptcy relief"); *Ohio v. Kovacs*, 469 U.S. 274, 279 (1985).

The decision of the Ninth Circuit is all the more clearly in error because it intrudes improperly on the relationship between the State of Arizona and one of its agencies. Arizona Revised

Statute § 12-348 plainly directs that the Commission is liable for the attorneys' fees that the DeRoches incurred in the Commission's pursuit of unsuccessful litigation against the DeRoches. Where, as here, a debtor in bankruptcy seeks recovery under such a state statute, there is simply no basis to conclude that general federal common law may thwart the State's direction of its own liability. Because the case presents an important question of the extent to which federal general common law rules may thwart the operation of a state statute directing the State's own liability, certiorari is warranted.

CONCLUSION

For the foregoing reasons, the DeRoches respectfully request that the Court issue a writ of certiorari in this case.

Respectfully submitted,

G. Eric Brunstad, Jr.
Counsel of Record
Rheba Rutkowski
William C. Heuer
Peter Tolsdorf
BINGHAM MCCUTCHEN LLP
One State Street
Hartford, Connecticut 06103
(860) 240-2700

Allan D. NewDelman
Roberta J. Sunkin
ALLAN D. NEWDELMAN, P.C.
80 East Columbus Aveune
Phoenix, Arizona 85012
(602) 264-4550

Counsel for Petitioners

Dated: May 9, 2006

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED JANUARY 17, 2006

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04-15258
D.C. No. CV-03-00463-EHC

In re: MARY DEROCHE; In re: ERIC DEROCHE,

Debtors,

MARY DEROCHE; ERIC DEROCHE,

Appellants,

v.

ARIZONA INDUSTRIAL COMMISSION,

Appellee.

OPINION

Appeal from the United States District Court
for the District of Arizona
Earl H. Carroll, District Judge, Presiding

Argued and Submitted
October 17, 2005—San Francisco, California

Filed January 17, 2006

Appendix A

THOMAS, Circuit Judge:

This case presents the question of whether Chapter 7 debtors may recover, pursuant to state statute, attorneys' fees incurred in bankruptcy discharge litigation. We conclude that attorneys' fees are not available for litigating federal bankruptcy issues, and we affirm the decision of the district court.

I

Eric and Mary DeRoche (collectively "DeRoche") filed a joint Chapter 7 bankruptcy petition on November 28, 1994, in the District of Arizona. On December 30, 1994, the Arizona Industrial Commission ("the Commission") filed what it termed a priority proof of claim, to which DeRoche promptly objected. The Commission sought to recover sums paid to an injured DeRoche employee from the state's Special Fund, which provides workers compensation benefits to workers who are not covered by workers compensation insurance when they are injured. The amount of the Commission's claim, initially only $22,421.52, has increased as the injured worker has continued to receive benefits.

On March 17, 1995, the bankruptcy court discharged DeRoche's debts, except for the pending dispute with the Commission. For the next seven years, the parties litigated various issues related to whether or not the Commission's claim was also subject to discharge. The parties first disputed whether the Commission's claim qualified as an "excise tax"—and thus potentially a priority, nondischargeable claim—within the meaning of 11 U.S.C. § 507(a)(8)(E). In the end, the bankruptcy court found that the claim was an

excise tax based on *Industrial Commission of Arizona v. Camilli*, 94 F.3d 1330 (9th Cir. 1996), issued while the DeRoche dispute was pending. The bankruptcy court next inquired what "transaction" had triggered the tax. To qualify as a priority excise tax, a tax must be based on "a transaction occurring during the three years immediately preceding the date of the filing of the petition." 11 U.S.C. § 507(a)(8)(E)(ii). The Commission's claim did not depend on a single event easily identifiable as the relevant "transaction", but could arguably be linked to the continuing series of benefit payments, the injury itself, or even the injured worker's application for benefits. Eventually, after the dispute reached this Court, we held that the transaction date was the date of injury, more than three years before the bankruptcy petition. *DeRoche v. Ariz. Indus. Comm'n (In re DeRoche)*, 287 F.3d 751 (9th Cir. 2002). Thus, the Commission's claim had no priority status, and was subject to discharge. Ultimately, on remand, the bankruptcy court entered an order sustaining DeRoche's objection to the Commission's proof of claim and finding that the claim was a general claim subject to the general discharge order entered seven years before.

On August 7, 2002, DeRoche filed an application for over $30,000 in attorney's fees incurred opposing the Commission's priority claim. The bankruptcy court denied the application, after holding hearings on November 14, 2002, and January 22, 2003. After DeRoche filed a Notice of Appeal and Referral to the Bankruptcy Appellate Panel on February 5, 2003, the Commission elected to have the appeal heard by the District Court. The District Court denied the appeal on January 30, 2004, without argument, and DeRoche timely filed this appeal.

Appendix A

II

"It is the general rule in the United States that in the absence of legislation providing otherwise, litigants must pay their own attorney's fees." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 415 (1978). "Congress has provided only limited exceptions to this rule 'under selected statutes granting or protecting various federal rights.' " *Id.* (quoting *Alyeska Pipeline Co. v. Wilderness Soc'y.*, 421 U.S. 240, 260 (1975)). Thus, the Supreme Court has observed that "it would be inappropriate for the Judiciary, without legislative guidance, to reallocate the burdens of litigation." *Alyeska Pipeline Co.*, 421 U.S. at 247.

Consistent with this philosophy, we have held that, absent bad faith or harassment, attorney's fees are not recoverable in bankruptcy for litigating issues "peculiar to federal bankruptcy law." *Fobian v. Western Farm Credit Bank (In re Fobian)*, 951 F.2d 1149, 1153 (9th Cir. 1991). The Bankruptcy Code does contain some fee provisions. *See, e.g., Lamie v. United States*, 540 U.S. 526, 529 (2004) (discussing the statutory limitation on awards of professional fees). However, it does not contain any provisions that create a general right for the prevailing party to be awarded attorney's fees in federal bankruptcy litigation. Thus, we have held that "[t]here is no general right to recover attorney's fees under the Bankruptcy Code." *Renfrow v. Draper (In re Renfrow)*, 232 F.3d 688, 693 (9th Cir. 2000).

One of the exceptions to the general rule is proceedings based on a contract enforceable under state law or statute. *Fobian*, 951 F.2d at 1153. As we have explained, "a prevailing

party in a bankruptcy proceeding may be entitled to an award of attorney fees in accordance with applicable state law if state law governs the substantive issues raised in the proceedings." *Ford v. Baroff (In re Baroff)*, 105 F.3d 439, 441 (9th Cir. 1997). Thus, in *Christison v. Norm Ross Co. (In re Eastview Estates II)*, 713 F.2d 443, 451 (9th Cir. 1983), we awarded fees because the substantive legal question — the legitimacy of the claim — was governed by California law, which also authorized collection of attorney fees pursuant to the contract at issue. However, we consistently have refused to award fees when the substantive legal question was governed by federal bankruptcy law, rather than "basic contract enforcement questions," even when the underlying contract contains an attorney fee provision enforceable under state law. *Fobian*, 951 F.2d at 1153; *see also Johnson v. Righetti (In re Johnson)*, 756 F.2d 738, 740 (9th Cir. 1985) (denying fees based on state contract provisions when the bankruptcy proceeding "was predicated solely upon a federal statute and California state law was not applied to any of the substantive issues involved."); *Renfrow*, 232 F.3d at 694 ("[I]f a divorce decree provides for the payment of attorney's fees, and state law issues are litigated in the bankruptcy proceedings, attorney's fees are available, but only to the extent that they were incurred litigating the state law issues.").

III

Given that background, we turn to the case at hand. In this case, DeRoche properly concedes that the bankruptcy litigation here addressed only issues of federal law, namely whether or not the Commission's claim was entitled to

priority under federal bankruptcy law. A close review of the record indicates that there were no substantive state law questions involved in the litigation; only substantive federal law was at issue.

With that finding, application of our clear and consistent case law would seem to end the matter. However, DeRoche contends that our precedent barring attorney's fees does not apply, because DeRoche seeks fees under an Arizona statute, A.R.S. § 12-348, rather than a contract.[1] DeRoche argues

---

1. The statute provides in relevant part as follows:

> **§ 12-348. Award of fees and other expenses against the state or a city, town or county; reduction or denial of award; application; basis for amount of award; source of award; definitions**
>
> A. In addition to any costs which are awarded as prescribed by statute, a court shall award fees and other expenses to any party other than this state or a city, town or county which prevails by an adjudication on the merits in any of the following:
>
> 1. A civil action brought by the state or a city, town or county against the party.
>
> 2. A court proceeding to review a state agency decision pursuant to chapter 7, article 6 of this title or any other statute authorizing judicial review of agency decisions.
>
> 3. A proceeding pursuant to § 41-1034.

(Cont'd)

Appendix A

(Cont'd)

4. A special action proceeding brought by the party to challenge an action by the state against the party.

5. An appeal by the state to a court of law from a decision of the personnel board under title 41, chapter 4, article 6.

6. A civil action brought by the party to challenge the seizure and sale of personal property by the state or a city, town or county.

B. In addition to any costs which are awarded as prescribed by statute, a court may award fees and other expenses to any party, other than this state or a city, town or county, which prevails by an adjudication on the merits in an action brought by the party against this state or a city, town or county challenging:

1. The assessment or collection of taxes or in an action brought by this state or a city, town or county against the party to enforce the assessment or collection of taxes.

2. The adequacy or regularity of notice of delinquent taxes.

3. The regularity of sales of property for delinquent taxes.

C. The court in its discretion may deny the award provided for in this section or may reduce the award if it finds that any of the following applies:

1. During the course of the proceeding the prevailing party unduly and unreasonably protracted the final resolution of the matter.

(Cont'd)

that because the statute protects individual citizens against unwarranted litigation pursued by the state, it represents an important state public policy that deserves more respect than private-party contract arrangements for fee payments.

The district court and bankruptcy court correctly rejected this argument. As we have discussed, it is the substantive nature of the bankruptcy proceeding that controls. Here, the Commission was seeking to vindicate what it thought was its substantive federal bankruptcy right, and all of the legal fees incurred by both sides were accrued in either pursuit or defense of that action. State law does not, and cannot, create a new federal right of attorney fee recovery in this context.

We considered a similar issue in *Johnson.* In *Johnson*, the debtor sought fees not under the parties' contractual fee agreement, which provided only that the *creditor* could recover its fees, but under a California statute that equalized the effect of such one-sided fee agreements by allowing either party to recover fees if it prevailed in a subsequent lawsuit. Despite this statutory expression of state public policy, we found that "[w]hen, as here, federal and not state law governed the substantive issues involved in the [creditors']

(Cont'd)

> 2. The reason that the party other than the state or a city, town or county has prevailed is an intervening change in the applicable law.
>
> 3. The prevailing party refused an offer of civil settlement which was at least as favorable to the party as the relief ultimately granted.

motion, the bankruptcy court should not have awarded attorney's fees pursuant to a state statute." *Johnson*, 756 F.2d at 741.

The character of the particular state statute is irrelevant to this analysis. Our clear rule is that no fees are available under state law for litigation of substantive federal bankruptcy issues in bankruptcy court. There is no principled distinction to be drawn from this rule for *sui generis* treatment of fee claims based on fee-shifting statutes directed at state governments.

For these reasons, we affirm the judgment of the district court.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA DATED JANUARY 29, 2004 AND FILED JANUARY 30, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CIV 03-463-PHX-EHC

Eric DeRoche and Mary DeRoche,

_____ Debtors,

Eric DeRoche and Mary DeRoche,

Appellants,

vs.

Industrial Commission of Arizona, et al.,

Appellee.

ORDER

Pending before the Court is Debtors' Appeal from a United States Bankruptcy Court Order, which denied their request to seek payment of attorneys' fees against the Industrial Commission of Arizona pursuant to A.R.S. § 12-348(A)(1). [Dkt. 2-1].

Appendix B

I. Background

Although Debtors ultimately prevailed in obtaining a Discharge Order for a $22,000 claim, Debtors incurred over $30,000 in attorneys' fees, primarily from litigating for seven (7) years whether the money owed to Appellee was subject to the Discharge Order. The Ninth Circuit determined that the obligation was subject to the Discharge Order entered nearly seven (7) years earlier. *In re DeRoche*, 287 F.3d 751 (9th Cir. 2002). The issue now is whether the Debtors are entitled to attorneys' fees pursuant to Arizona state law. *See* A.R.S. § 12-348.

II. Standard of Review

District courts have jurisdiction to hear appeals from final judgments, orders, and decrees of Bankruptcy Courts. 28 U.S.C. § 158(a). A Bankruptcy Court's findings of fact are subject to review for clear error; conclusions of law are subject to *de novo* review. *In re Tuma*, 916 F.2d 488, 490 (9th Cir. 1990); *See In re Daniels-Head & Assoc.*, 819 F.2d 914, 918 (9th Cir. 1987); *Matter of Excalibur Auto. Corp.*, 859 F.2d 454 (7th Cir. 1988).

III. Discussion

"No general right to attorney fees exists under the Bankruptcy Code. However, a prevailing party in a bankruptcy proceeding may be entitled to an award of attorney fees in accordance with applicable state law if state law governs the substantive issues raised in the proceedings." *In re Baroff*, 105 F.3d 439, 441 (9th Cir. 1997); *Renfrow v. Draper*, 232 F.3d 688, 693 (9th Cir. 2000).

Appendix B

Absent substantive issues governed by state law, Debtors are not entitled to an award of attorneys' fees. *See In re Baroff*, 105 F.3d at 441; *Renfrow*, 232 F.3d at 693. The Ninth Circuit has explained: "[I]n *Fobian v. Western Farm Credit Bank* . . . we refused to award attorney fees despite an express contractual provision because the substantive litigation raised federal bankruptcy law issues rather than 'basic [state governed] contract enforcement questions.' " *In re Baroff*, 105 F.3d at 441. "Similarly, in *In re Johnson* . . . we refused to award attorney fees pursuant to California law and a contractual provision because the underlying stay litigation raised federal statutory issues rather than issues relating to the contract." *Id.* at 442.

Here, Debtors do not argue that state law governs the substantive issues raised in the bankruptcy proceedings. In their Reply Brief, Debtors admit they "do not dispute that the issue before the Bankruptcy Court was one of a federal question." [Dkt. 6, p.1]. Rather, Debtors argue that Appellees choice of a federal forum, as opposed to a state forum, and public policy, dictate an award of attorneys' fees in this instance.

The Bankruptcy Court relied on Ninth Circuit case law in reaching its conclusion that attorneys' fees were not recoverable in this action. *See In re Baroff, supra; Renfrow v. Draper, supra.* According to the Honorable Charles G. Case, who presided, these cases "do not contain any wiggle room." [Dkt. 4, p. 5].[1] Judge Case agreed with the parties

1. Appellees conceded, in response to questioning from Judge Case, that "it looks like the [Arizona] statute [would] apply" in state court, but not in federal court. [Dkt. 4, p. 10]. Further, Judge Case

(Cont'd)

that "[t]he only issues litigated in this case were federal law issues." Bankr.Ct. Order, p. 3.[2] That agreement, Debtors maintain, does not reflect "the end of the analysis." [Dkt. 6, p. 1]. However, the Court finds, based on Ninth Circuit case law discussed *supra,* that when no substantive issues are governed by state law, the analysis ends.

The Court agrees with Judge Case's determination that despite the public policy stated by the Arizona Legislature and the "unfairness of precluding an award of fees where the State chooses bankruptcy court rather than state court to pursue its claim, no award of fees is possible here." Bankr. Ct. Order, p. 3.

(Cont'd)

wondered "[w]hy . . . the application of the [statute, which is based on public policy is, in turn,] based upon whether or not the State [litigates] in a federal forum or a state forum." [Dkt. 4, p . 9]. However, Judge Case found that "[t]o the extent a party has litigated federal issues, the state law basis for the award of fees is not available." Bankr. Ct. Order, p. 2-3.

2. Judge Case determined that "[t]he controlling questions were whether the unpaid workers' compensation contributions were 'excise taxes' and, if so, whether the 'transaction' giving rise to the tax occurred 'after three years before the date of filing of the petition.' Both of these are purely federal law issues under 11 U.S.C. § 507(a)(8)." Bankr. Ct. Order, p. 3.

Accordingly,

IT IS ORDERED that Debtors' Appeal is **DENIED.** [Dkt. 2-1].

DATED this 29 day of January, 2004.

s/ Earl H. Carroll
Earl H. Carroll
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES BANKRUPTCY COURT IN AND FOR THE DISTRICT OF ARIZONA DATED AND FILED JANUARY 22, 2003

UNITED STATES BANKRUPTCY COURT
IN AND FOR THE DISTRICT OF ARIZONA

In Chapter 7 proceedings

Case No. 94-10496-PHX-CGC

ERIC DEROCHE and MARY DEROCHE,

Debtors.

MEMORANDUM DECISION
RE: ATTORNEY'S FEES

(Under Advisement Ruling)

Debtors, Eric and Mary DeRoche ("Debtors") filed a no-asset Chapter 7 case. The State of Arizona ("State") filed a priority claim for unpaid workers' compensation contributions. The State asserted that the unpaid contributions were an "excise tax" under 11 U.S.C. section 507 (a)(8). If allowed, this claim would have been nondischargeable under 11 U.S.C. § 523(a)(l).

Debtors objected to the claim on the grounds that, first, the unpaid contributions were not a "tax" and, second, that if they were, they had accrued outside the statutory three year period for priority. After proceedings in this Court, and appeals to the District Court and the Ninth Circuit Court of Appeals, Debtors eventually prevailed, and the claim was

discharged. Debtors now seek to recover their attorney's fees in an amount in excess of $30,000.00. Their attorney's fees claim now rests solely upon an Arizona statute, A.R.S. § 12-348(A)(1), which states in pertinent part:

> In addition to any costs which are awarded as prescribed by statute, a court shall award fees and other expenses to any party other than this state or a city, town or county, which prevails by an adjudication on the merits of any of the following:
>
> 1. A civil action brought by the state

Debtors assert that, even though they commenced the bankruptcy, it was the State that commenced a "civil action" against them when it filed its priority proof of claim in a no-asset case, thereby triggering the dischargeability question against the Debtors. Debtors argue that the State was not required to file the claim; rather, the State could have declined to participate in the bankruptcy proceedings and thereafter filed a collection action in state count on the grounds that the debt had not been discharged by the bankruptcy. In any such proceeding, Debtors' defense, appropriately assertable in a state court action, would have been that the debt had been discharged. If the State had not prevailed in such a state court action, Debtors argue, fees would clearly be mandatory under section 12-348. Having chosen instead to fight this battle in the bankruptcy arena, Debtors assert that the result should be no different.

Appendix C

The State makes two responses. First, it contends that it has not commenced a "civil action" against Debtors. Second, even if its proof of claim is so construed, fees are not awardable under Ninth Circuit precedent *Renfrow v. Draper*, 232 F.3d 688 (9th Cir. 2000) and *In re Baroff*, 105 F.3d 439 (9th Cir. 1997). Debtors contend that the holdings in *Renfrow* and *Baroff* should be limited to state contract actions or similar cases (such as divorce cases) and should not be construed to prohibit application of a mandatory fee statute that embodies a basic public policy that an individual should not bear the costs of successful litigation commenced by the state.

The Court has no trouble concluding that the filing of the proof of claim falls within the broad meaning of "civil action" contemplated by section 12-348. The State was under no compunction to file the proof of claim; nondischargeable tax claims under section 523(a)(l) can be litigated in either federal or state court. Unlike claims asserted to be nondischargeable under sections 523(a)(2), (a)(4), (a)(6), or (a)(15), there is no short statute of limitations that forces the creditor to bring the case promptly in the Bankruptcy Court. Here, as explained above, the State could have sat on the sidelines and proceeded in state court. Having chosen the bankruptcy forum, the Court concludes that the State commenced a "civil action" in which it was not successful and thus would ordinarily fall within the scope of section 12-348(A)(l).

The question, therefore, is whether *Renfrow* and *Baroff* bar recovery of the fees in this case. The basic rule of those two cases is that there is no general right to attorney's fees in a bankruptcy case; rather, a party may recover attorney's

fees under a state statute only to the extent fees were incurred litigating state issues. To the extent a party has litigated federal issues, the state law basis for the award of fees is not available. As the Ninth Circuit said in *Renfrow:*

> The rule we announced in *In re Baroff* does not permit a bankruptcy court to award a party attorney's fees for litigating federal law issues in a bankruptcy court whenever state law is "integral" to determining dischargeability. Instead, we held that attorney's fees should be awarded solely to the extent they were incurred in litigating state law issues.

232 F.3d at 694.

The only issues litigated in this case were federal law issues. The controlling questions were whether the unpaid workers' compensation contributions were "excise taxes" and, if so, whether the "transaction" giving rise to the tax occurred "after three years before the date of filing of the petition." Both of these are purely federal law issues under 11 U.S.C. § 507(a)(8).

The language of *Renfrow* is unequivocal and does not appear to be limited in scope. Therefore, notwithstanding the public policy stated by the state legislature and the apparent unfairness of precluding an award of fees where the State chooses bankruptcy court rather than state court to pursue its claim, no award of fees is possible here.

Appendix C

For the foregoing reasons, Debtors' application for attorney's fees is denied.

So ordered.

DATED: January 22, 2003

s/ Charles G. Case II
CHARLES G. CASE II
UNITED STATES BANKRUPTCY JUDGE

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING FILED FEBRUARY 8, 2006

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04-15258

D.C. No. CV-03-00463-EHC
District of Arizona, Phoenix

In re: MARY DEROCHE; In re: ERIC DEROCHE,

Debtors,

MARY DEROCHE; et al.,

Appellants,

V.

ARIZONA INDUSTRIAL COMMISSION,

Appellee.

ORDER

Before: REINHARDT and THOMAS, Circuit Judges, and RESTANI,* Chief IT Judge.

The appellants' petition for rehearing is DENIED.

---

* The Honorable Jane A. Restani, Judge, United States Court of International Trade, sitting by designation.

APPENDIX E — RELEVANT STATUTES

§ 507. Priorities

(a) The following expenses and claims have priority in the following order:

* * *

(8) Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for—

* * *

(E) an excise tax on—

* * *

(ii) if a return is not required, a transaction occurring during the three years immediately preceding the date of the filing of the petition;

* * *

Appendix E

§ 523. Exceptions to discharge

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

(1) for a tax or a customs duty—

(A) of the kind and for the periods specified in section 507(a)(3) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed;

* * *

Appendix E

§ 12-348. Award of fees and other expenses against the state or a city, town or county; reduction or denial of award; application; basis for amount of award; source of award; definitions

A. In addition to any costs which are awarded as prescribed by statute, a court shall award fees and other expenses to any party other than this state or a city, town or county which prevails by an adjudication on the merits in any of the following:

1. A civil action brought by the state or a city, town or county against the party.

2. A court proceeding to review a state agency decision pursuant to chapter 7, article 6 of this title or any other statute authorizing judicial review of agency decisions.

3. A proceeding pursuant to § 41-1034.

4. A special action proceeding brought by the party to challenge an action by the state against the party.

5. An appeal by the state to a court of law from a decision of the personnel board under title 41, chapter 4, article 6.

6. A civil action brought by the party to challenge the seizure and sale of personal property by the state or a city, town or county.

B. In addition to any costs which are awarded as prescribed by statute, a court may award fees and other expenses to any party, other than this state or a city, town or county, which prevails by an adjudication on the merits in an action brought by the party against this state or a city, town or county challenging:

1. The assessment or collection of taxes or in an action brought by this state or a city, town or county against the party to enforce the assessment or collection of taxes.

2. The adequacy or regularity of notice of delinquent taxes.

* * *

D. A party may apply pursuant to the applicable procedural rules for an award of attorney fees and other expenses authorized under this section and shall include as part of the application evidence of the party's eligibility for the award and the amount sought, including an itemized statement from the attorneys and experts stating the actual time expended in representing the party and the rate at which the fees were computed.

* * * *

Supreme Court, U.S.
FILED
JUL 12 2006
OFFICE OF THE CLERK

No. 05-1439

In The Supreme Court of the United States

MARY DEROCHE and ERIC DEROCHE,

Petitioners,

v.

ARIZONA INDUSTRIAL COMMISSION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

TERRY GODDARD
Attorney General of Arizona

MARY O'GRADY
Solicitor General

PAULA S. BICKETT*
Chief Counsel for Civil Appeals

ANTHONY S. VITAGLIANO
Chief Counsel for Tax
Bankruptcy & Collection

DENISE ANN FAULK
Assistant Attorney General

1275 West Washington Street
Phoenix, Arizona 85007
(602) 542-8304
Attorneys for Respondent

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

The Court of Appeals determined that Petitioners were not entitled to an award of attorney's fees under an Arizona statute that awards attorney's fees to parties who prevail in civil litigation that the State brought against them because federal law does not allow fees for litigation of the substantive federal bankruptcy issues that were litigated here. Are Petitioners entitled to an award of attorney's fees for prevailing against the Arizona Industrial Commission on the issue of dischargeability when the attorney's fees are not provided by the Bankruptcy Code or a contractual provision between the parties?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI	1
STATEMENT OF THE CASE	1
A. Statement of Facts	1
B. Proceedings Below	3
REASONS FOR DENYING THE WRIT	3
I. The Ninth Circuit's Decision Is Consistent with This Court's Prior Decisions, the Bankruptcy Code, and Congressional Intent	3
II. The Ninth Circuit Decision Does Not Conflict with the Decisions of Other Circuits	11
CONCLUSION	14

TABLE OF AUTHORITIES

Page

CASES

Alport v. Ritter (In re Alport), 144 F.3d 1163 (8th Cir. 1998) 11

Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975) 3, 10

Atherton v. F.D.I.C., 519 U.S. 213 (1997) 10

BankBoston, N.A. v. Sokolowski (In re Sokolowski), 205 F.3d 532 (2nd Cir. 2000) 13, 14

Cadle Co. v. Martinez (In re Martinez), 416 F.3d 1286 (11th Cir. 2005) 11

Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978) 3

Colbert v. Colbert (In re Colbert), 185 B.R. 247 (Bankr. M.D. Tenn. 1995) 7, 13

Coston v. Malvern (In re Coston), 991 F.2d 257 (5th Cir. 1993) 12

Davidson v. Davidson (In re Davidson), 947 F.2d 1294 (5th Cir. 1991) 12

DeRoche v. Ariz. Indus. Comm'n (In re DeRoche), 287 F.3d 751 (9th Cir. 2002) 2

F.D. Rich Co., Inc. v. United States, Indus. Lumber Co., Inc., 417 U.S. 116 (1974) 4, 5

FCC v. NextWave Pers. Commc'ns Inc., 537 U.S. 293 (2003) 7

Indus. Comm'n of Arizona v. Camilli (In re Camilli), 94 F.3d 1330 (9th Cir. 1996) 2

TABLE OF AUTHORITIES – Continued

Page

Jordan v. Se. Nat'l Bank (In re Jordan), 927 F.2d 221 (5th Cir. 1991) 12

Martin v. Bank of Germantown (In re Martin), 761 F.2d 1163 (6th Cir. 1985) 12, 13

Pride Cos., L.P. v. Johnson (In re Pride Cos., L.P.), 285 B.R. 366 (Bankr. N.D. Tex. 2002) 8

Renfrow v. Draper, 232 F.3d 688 (9th Cir. 2000) 5

Sec. Mortgage Co. v. Powers (In re Florida Furniture Co.), 278 U.S. 149 (1928) 7

Three Sisters Partners, LLC v. Harden (In re Shangra-La, Inc.), 167 F.3d 843 (4th Cir. 1999) 11

TranSouth Fin. Corp. v. Johnson, 931 F.2d 1505 (11th Cir. 1991) 12

TRW, Inc. v. Andrews, 534 U.S. 19 (2001) 8

V.M. v. S.S. (In re S.S.), 271 B.R. 240 (Bankr. D.N.J. 2002) 13

In re Waldo, 186 B.R. 118 (Bankr. D. Mont. 1995) 2

Wheeldin v. Wheeler, 373 U.S. 647 (1963) 10

Worthen Bank & Trust Co. v. Morris (In re Morris), 602 F.2d 826 (8th Cir. 1979) 12

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. art. I, § 8, cl. 4 ..... 5, 10

11 U.S.C. § 110(i)(1) 5, 6

11 U.S.C. § 110(i)(2) 5, 6

11 U.S.C. § 111(g)(2)(B) 5, 6

11 U.S.C. § 303(i)(1)(B) 5

TABLE OF AUTHORITIES – Continued

Page

11 U.S.C. § 362(k) 5
11 U.S.C. § 365(b)(1)(B) 11
11 U.S.C. § 506(b) 5, 7
11 U.S.C. § 507(a)(8)(E) 2
11 U.S.C. § 507(a)(8)(E)(ii) 2
11 U.S.C. § 521(2) 14
11 U.S.C. § 523 ..... 9, 13
11 U.S.C. § 523(a)(1) 2
11 U.S.C. § 523(d) 5, 6, 8
11 U.S.C. § 526(c)(2) 5, 6
11 U.S.C. § 526(c)(3)(C) 5, 6
11 U.S.C. § 707(b)(4)(A) 5, 6
11 U.S.C. § 707(b)(5)(A) 6
Ariz. Rev. Stat. § 12-348 3
N.J. Stat. Ann. § 9:17-54 13

OTHER AUTHORITIES

4 *Collier on Bankruptcy*, ¶506.04[3][a] (15th ed. 2006) 11
H.R. Rep. No. 595, 95th Cong., 1st Sess. 131, *reprinted in* 1978 U.S.C.C.A.N. 5787 9

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondent, Arizona Industrial Commission (the "Commission"), respectfully requests this Court to deny Mary and Eric DeRoche's Petition for Certiorari seeking review of the opinion of the Ninth Circuit Court of Appeals.

STATEMENT OF THE CASE

This case concerns whether a litigant in federal bankruptcy court is entitled to an award of attorney's fees for litigating federal issues in bankruptcy court when the fees are not authorized by federal law or contract. No federal court has held that a debtor is entitled to an award of attorney's fees for prevailing on a federal bankruptcy issue even though the Bankruptcy Code does not allow fees and there is no contractual relationship between the creditor and debtor. Therefore, this decision does not conflict with the decisions of other circuit courts. Because the Court of Appeals decision is consistent with this Court's precedent and the purposes of the Bankruptcy Code, the Court should deny certiorari.

A. Statement of Facts.

Petitioners filed a joint Chapter 7 bankruptcy petition on November 28, 1994, in the District of Arizona. On December 30, 1994, the Commission filed a priority proof of claim ("Claim") for continuing payments to Petitioners' former employee, who was injured while Petitioners failed to have workers' compensation insurance as required by state law. Petitioners objected to the Claim.

First, the parties litigated whether the Claim was an excise tax entitled to priority under 11 U.S.C. § 507(a)(8)(E). While the parties were litigating the issue, the Ninth Circuit decided *Indus. Comm'n of Arizona v. Camilli (In re Camilli)*, 94 F.3d 1330 (9th Cir. 1996), which established that reimbursement claims for workers' compensation benefits are excise taxes. The bankruptcy court held that the Commission's Claim constituted an excise tax. Pet. App. at 2a-3a.

Next, the parties litigated the transaction date for the excise tax. Excise taxes for transactions occurring within three years preceding the bankruptcy filing are priority claims. 11 U.S.C. § 507(a)(8)(E)(ii). The Commission interpreted "transaction" in accordance with *In re Waldo*, 186 B.R. 118 (Bankr. D. Mont. 1995), *aff'd*, 108 F.3d 340 (9th Cir. 1997), as a priority claim that was nondischargeable pursuant to 11 U.S.C. § 523(a)(1). The bankruptcy court agreed with the Commission and ruled in its favor. *DeRoche v. Ariz. Indus. Comm'n (In re DeRoche)*, 287 F.3d 751, 755 (9th Cir. 2002). Petitioners appealed, and the district court upheld the bankruptcy court's decision. *Id.*

Petitioners again appealed and finally obtained a favorable ruling. *Id.* at 757. The Ninth Circuit held that the transaction date for the excise tax was the injury date, which was more than three years before the bankruptcy was filed. *Id.* Accordingly, the Claim was not a priority claim and was dischargeable. At each level, the federal courts decided only the federal law issues of priority and dischargeability and did not decide any state law issues. On remand, the bankruptcy court sustained the Petitioners' objection to the Claim and found that the Claim was included in the discharge order entered seven years before. Pet. App. at 3a.

B. Proceedings Below.

On August 7, 2002, Petitioners filed an application under Arizona Revised Statute § 12-348 for over $30,000 in attorney's fees incurred in the ultimately successful challenge to the Claim. This Arizona statute permits a court to award attorney's fees against the State if a litigant prevails in an action against it to challenge the assessment or collection of taxes. Petitioners cited no basis in the Bankruptcy Code for the claimed attorney's fees. The bankruptcy court denied the request for attorney's fees. Pet. App. at 18a. The Petitioners appealed. The district court denied the appeal. Pet. App. at 13a. The Petitioners appealed to the Ninth Circuit. After oral argument, the Ninth Circuit denied the appeal, because the Petitioners had not demonstrated any federal right to attorney's fees for litigating purely federal issues in federal bankruptcy court. Pet. App. at 9a.

REASONS FOR DENYING THE WRIT

I. The Ninth Circuit's Decision Is Consistent with This Court's Prior Decisions, the Bankruptcy Code, and Congressional Intent.

"It is the general rule in the United States that in the absence of legislation providing otherwise, litigants must pay their own attorney's fees." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 415 (1978) (citing *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975)). "Congress has provided only limited exceptions to this rule 'under selected statutes granting or protecting *various federal rights*.'" *Id.* (quoting *Alyeska Pipeline*, 421 U.S. at 260 (emphasis added)).

In *F.D. Rich Co., Inc. v. United States, Industrial Lumber Co., Inc.*, 417 U.S. 116 (1974), this Court established that a litigant in federal court is not entitled to an award of attorney's fees for litigating federal rights unless a federal statute authorizes the fees. In that case, this Court explained:

> The Miller Act provides a federal cause of action, and the scope of the remedy as well as the substance of the rights created thereby is a matter of federal not state law. Neither respondent nor the court below offers any evidence of congressional intent to incorporate state law to govern *such an important element* of Miller Act litigation *as liability for attorneys' fees*. Many federal contracts involve construction in more than one State, and often, as here, the parties to Miller Act litigation have little or no contact, other than the contract itself, with the State in which the federal project is located. The reasonable expectations of such potential litigants are better served by a rule of uniform national application.

Id. at 127 (emphasis added).

This Court could as easily have been writing about the Bankruptcy Code. Like the Miller Act, the Bankruptcy Code provides a federal cause of action. The Bankruptcy Code, not state law, determines the scope of the remedy (discharge) and the substance of the rights created thereby (discharge injunction). The Petitioners have offered no evidence of congressional intent to incorporate state law regarding attorney's fees into bankruptcy court litigation. In fact, the Bankruptcy Code itself contains provisions regarding attorney's fees, establishing the federal right to attorney's fees in federal bankruptcy litigation in the circumstances when Congress has deemed such fees

appropriate. *See* 11 U.S.C. §§ 110(i)(1), 110(i)(2), 111(g)(2)(B), 303(i)(1)(B), 362(k), 506(b), 523(d), 526(c)(2), 526(c)(3)(C), 707(b)(4)(A), and 707(b)(5)(A). Finally, the need for uniformity under the Bankruptcy Code is even stronger than under the Miller Act, since the Constitution requires uniformity for bankruptcy laws. The Bankruptcy Clause, U.S. Const. art. I, § 8, cl. 4.

Moreover, this rule is intrinsically sound: Congress decides whether attorney's fees are allowed when litigating federal rights that Congress has established in the first instance. It is appropriate that state law, including state contract law, govern whether litigants are entitled to attorney's fees for litigating state law rights. To the extent that Petitioners argue that state law should govern whether parties are entitled to attorney's fees incurred litigating federal rights, they are simply mistaken: States lack authority to direct that federal courts award attorney's fees to a party who prevails on an issue of federal law. *F.D. Rich,* 417 U.S. at 127.

The Bankruptcy Code, like the Miller Act, is a complex system. As the Ninth Circuit correctly noted, "[t]here is no general right to recover attorney's fees under the Bankruptcy Code." *Renfrow v. Draper,* 232 F.3d 688, 693 (9th Cir. 2000). Congress has permitted attorney's fees in bankruptcy cases only when it has deemed them necessary to further a congressional purpose. As part of its statutory scheme, Congress has historically permitted attorney's fees to oversecured creditors under 11 U.S.C. § 506(b), to a prevailing debtor when an involuntary petition is filed under 11 U.S.C. § 303(i)(1)(B), to individuals injured by willful violations of the automatic stay under 11 U.S.C. § 362(k), and to a debtor for successfully defending against the nondischargeability of a consumer debt if the creditor's

position was not substantially justified under 11 U.S.C. § 523(d).

Significantly, Congress recently made sweeping changes to the Bankruptcy Code, including adding several attorney's fee provisions. Under the Bankruptcy Abuse Prevention and Consumer Protection Act, Congress added the following provisions allowing attorney's fee awards: debtors may obtain attorney's fee awards against petition preparers under 11 U.S.C. § 110(i)(1); trustees and creditors may obtain attorney's fee awards against petition preparers under 11 U.S.C. § 110(i)(2); debtors may obtain attorney's fee awards against nonprofit budget and credit counseling agencies that willfully or negligently fail to comply with the Bankruptcy Code under 11 U.S.C. § 111(g)(2)(B); assisted persons may obtain attorney's fee awards against debt relief agencies for intentionally or negligently failing to comply with certain sections of the Bankruptcy Code under 11 U.S.C. § 526(c)(2); the States may obtain attorney's fee awards against debt relief agencies under 11 U.S.C. § 526(c)(3)(C); the trustee may obtain attorney's fee awards against the debtor's attorney under 11 U.S.C. § 707(b)(4)(A); and the debtor may obtain attorney's fee awards against a party in interest under 11 U.S.C. § 707(b)(5)(A). Despite these far-reaching changes to the Bankruptcy Code, Congress has not included a provision that allows an award of attorney's fees to a debtor for litigating priority and dischargeability or a provision allowing a debtor to obtain an award of attorney's fees under a state statute. Congress permits attorney's fee awards in bankruptcy only when it has determined that such awards serve a congressional purpose.

Petitioners misunderstand *Security Mortgage Co. v. Powers (In re Florida Furniture Co.)*, 278 U.S. 149 (1928). They assert that in that case this Court held that the determination of a claim for attorney's fees is a question of local law. *See* Pet. at 3. This Court actually held:

> The validity of the lien claimed by the mortgage company for attorney's fees must be determinated by the law of Georgia; for the contract was there made and was secured by real estate there situate. . . . The construction of the contract for attorney's fees presents, likewise, a question of local law.

Florida Furniture, 278 U.S. at 153-54 (citations omitted). Thus, the amount of the *lien*, including whether the lien includes attorney's fees, is determined by local law. Notably, in 11 U.S.C. § 506(b), Congress specifically included fees as charges that can be included in a claim secured by a lien if the property exceeds the base value of the debt. *Florida Furniture* does not hold, however, that the federal court must apply state law to determine if attorney's fees are available to a party who prevails on a federal issue.

Petitioners also misunderstand the import of *FCC v. NextWave Personal Communications Inc.*, 537 U.S. 293 (2003). In that case, this Court noted that the Bankruptcy Code provides that all debts are discharged unless a specific provision excepts the debt from discharge. *Id.* at 302-03. Because the Bankruptcy Code provides for attorney's fees in several discrete circumstances, it does not need an additional section disallowing the fees. Under the principle *expressio unius est exclusio alterius*, the inclusion of the fees in the enumerated circumstances indicates that Congress intended that all parties bear their own fees in all other circumstances. *See Colbert v. Colbert (In re*

Colbert), 185 B.R. 247, 248 (Bankr. M.D. Tenn. 1995) (mem.); *Pride Cos., L.P. v. Johnson (In re Pride Cos., L.P.)*, 285 B.R. 366, 372 (Bankr. N.D. Tex. 2002) (mem.); *cf. TRW, Inc. v. Andrews*, 534 U.S. 19, 28 (2001) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied in the absence of evidence of a contrary legislative intent.") (internal quotations and citation omitted).

Attorney's fees are permitted under the Bankruptcy Code against a creditor for unsuccessfully pursuing non-dischargeability of a consumer debt if the creditor's position was not substantially justified. 11 U.S.C. § 523(d). No corresponding provision allows attorney's fees to the creditor for successfully prosecuting a non-dischargeability action. The absence of such a corollary position is not an oversight:

> H.R. 8200 adopts a compromise. The false financial statement exception [to discharge of consumer debts] is retained, and the creditor, as under current law, is required to initiate the proceedings to determine if the debt is nondischargeable. If the debtor prevails, however, the creditor is taxed costs and attorney's fees, and may be taxed any actual pecuniary damages, such as loss of a day's work, that the debtor might have suffered as a result of the litigation. The present pressure on the honest debtor to settle in order to avoid attorney's fees in litigation over a creditor-induced false statement is eliminated. The creditor is protected from dishonest debtors by the continuance of the exception to discharge.
>
> The bill does not award the creditor attorney's fees if the creditor prevails. Though such a

> balance might seem fair at first blush, such a provision would restore the balance back in favor of the creditor by inducing debtors to settle no matter what the merits of their cases. In addition, the creditor is generally better able to bear the costs of a litigation than a bankrupt debtor, and it is likely that a creditor's attorney's fees would be substantially higher than a debtor's, putting an additional disincentive on the debtor to litigate.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 131, *reprinted in* 1978 U.S.C.C.A.N. 5787, 6092. Even more tellingly, Congress did not include a provision allowing attorney's fees against a creditor for pursuing non-dischargeability of a *non-consumer* debt, which is analogous to the instant case.[1] Congress could not have made it more clear that it was allowing and disallowing attorney's fees when it believes they will further the purposes of the Bankruptcy Code.

This Court held that federal courts may not create exceptions to the American Rule except under congressional guidance:

> In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser. We are asked to fashion a far-reaching exception to this 'American Rule'; but having considered its origin and development, we are convinced that it would be inappropriate for the Judiciary, without legislative

[1] The litigation in the instant case arose when the Petitioners objected to the Commission's Claim. Alternatively, the Commission could have filed a Complaint to Determine the Claim Non-Dischargeable under 11. U.S.C. § 523.

> guidance, to reallocate the burdens of litigation in the manner and to the extent urged by respondents and approved by the Court of Appeals.

Alyeska Pipeline, 421 U.S. at 247.

Petitioners argue that the Ninth Circuit is creating federal common law. Pet at 13. In *Atherton v. F.D.I.C.*, 519 U.S. 213, 218 (1997), this Court defined federal common law as "a rule of decision that amounts, not simply to an interpretation of a federal statute or a properly promulgated administrative rule, but, rather, to the judicial 'creation' of a special federal rule of decision." In denying attorney's fees here, the Ninth Circuit did not create federal common law. It merely applied the Bankruptcy Code.

Even if the Ninth Circuit were creating federal common law, it would be appropriate, because bankruptcy is an area of significant federal interest. Congress is constitutionally empowered to create uniform federal laws. The Bankruptcy Clause, U.S. Const. art. I, § 8, cl. 4. This Court has sanctioned the creation of federal common law when uniformity was desired. *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963). "The controlling legal requirement [is] the existence of a need to create federal common law arising out of a significant conflict or threat to a federal interest." *Atherton,* 519 U.S. at 224. Certainly, interfering with uniformity in bankruptcy constitutes a significant threat to a federal interest.

This Court should deny certiorari because the Ninth Circuit decision to deny fees correctly applies the Bankruptcy Code and is consistent with this Court's precedent.

II. The Ninth Circuit Decision Does Not Conflict with the Decisions of Other Circuits.

There is a split among the circuits regarding whether a contractual claim for attorney's fees that is valid under applicable state law is properly included as part of a secured creditor's claim and recoverable in bankruptcy. *See* 4 *Collier on Bankruptcy,* ¶506.04[3][a] at 506-118 (15th ed. 2006). But the Court cannot resolve the conflict by accepting certiorari here because this case does not involve a creditor's claim for attorney's fees under a contractual provision. This case concerns a claim for attorney's fees under a state statute by debtors who have no contractual relationship with the creditor and who prevailed on the federal issue of dischargeability. Petitioners have cited no cases in which the court has awarded attorney's fees under the circumstances involved here.

The cases that Petitioners rely on to establish an intercircuit conflict involve attorney's fee awards based on contractual provisions that bound the creditor and debtor. *Cadle Co. v. Martinez (In re Martinez),* 416 F.3d 1286, 1290-91 (11th Cir. 2005) (awarding fees to a debtor for successfully defending against a non-dischargeability suit because he had a contractual right to attorney's fees under Florida's reciprocity statute); *Alport v. Ritter (In re Alport),* 144 F.3d 1163, 1168 (8th Cir. 1998) (allowing attorney's fees to a creditor as part of a non-dischargeable debt because attorney's fees provided by contract, like accrued interest, can become part of the debt); *Three Sisters Partners, LLC v. Harden (In re Shangra-La, Inc.),* 167 F.3d 843, 847 (4th Cir. 1999) (awarding attorney's fees to a lessor as pecuniary loss under 11 U.S.C. § 365(b)(1)(B) because the lease provided for attorney's fees in the event of a default and the monies were spent as a result of the

default); *Martin v. Bank of Germantown (In re Martin)*, 761 F.2d 1163, 1168 (6th Cir. 1985) (allowing fees to a prevailing creditor because a contractual right to attorney's fees is part of the debt); *Jordan v. Se. Nat'l Bank (In re Jordan)*, 927 F.2d 221 (5th Cir. 1991), overruled on other grounds by *Coston v. Malvern (In re Coston)*, 991 F.2d 257 (5th Cir. 1993) (following *Martin* to award contractually required attorney's fees to a creditor); *Davidson v. Davidson (In re Davidson)*, 947 F.2d 1294, 1298 (5th Cir. 1991) (following *Jordan* to award contractually required attorney's fees to a creditor); *TranSouth Fin. Corp. v. Johnson*, 931 F.2d 1505, 1509 (11th Cir. 1991) (allowing contractually required attorney's fees to a creditor successful in a dischargeability proceeding); *Worthen Bank & Trust Co. v. Morris (In re Morris)*, 602 F.2d 826, 829 (8th Cir. 1979) (allowing a creditor to recover a contractually required attorney's fee).[2]

The rationale for allowing contractually required fees to be included as part of the debt does not apply here where there is no contractual relationship between the parties. For example, the Sixth Circuit reasoned that allowing prevailing creditors contractually required attorney's fees does not undercut Congress's intention in not allowing creditors to recover attorney's fees, noting: "Prevailing creditors still have no statutory right to attorney's fees, and if they have a contractual right, it must be assumed they gave value for that right at the time credit was advanced."

---

[2] Petitioners also cite numerous bankruptcy court decisions to support their argument that the Ninth Circuit decision here conflicts with other decisions. Pet. at 11. These cases also involve the allowance of contractually required attorney's fees and thus do not support their argument.

Martin, 761 F.2d at 1168. Instead of requesting implementation of a bargained for contractual provision, Petitioners requested the lower courts to apply a state statute to award them attorney's fees for prevailing on federal issues. The lower courts correctly denied their request because it is contrary to the provisions of the Bankruptcy Code.

To the extent that other courts have addressed an issue similar to the issue presented here, the courts have denied fees. In *Colbert v. Colbert (In re Colbert)*, 185 B.R. at 249, the Tennessee bankruptcy court recognized that *Martin* was premised on the parties having engaged in bargaining and giving value. Since that did not occur in *Colbert*, the Court did not allow attorney's fees. Similarly, in *V.M. v. S.S. (In re S.S.)*, 271 B.R. 240 (Bankr. D.N.J. 2002), the New Jersey bankruptcy court rejected a claim for attorney's fees for litigating the dischargeability of a judgment overturning a paternity action. The court reasoned:

> The plaintiff's nondischargeability action was not governed by the Parentage Act and did not address the enforcement or vindication of a right generated by the Parentage Act. The issue before the court in the plaintiff's adversary complaint was the nondischargeability of the debtor's debt under 11 U.S.C. § 523. Because the right vindicated in bankruptcy court arose as a federal claim under 11 U.S.C. § 523 and not as a state claim under N.J. Stat Ann. § 9:17-54, the statutory exception to the American Rule does not apply to allow the court to invoke the Parentage Act to award the plaintiff counsel fees for the adversary proceeding.

Id. at 246. And, in *BankBoston, N.A. v. Sokolowski (In re Sokolowski)*, 205 F.3d 532 (2nd Cir. 2000), the Second Circuit refused to allow attorney's fees under a state

statute, because the issue was solely whether a default-upon-filing provision in a contract was enforceable given 11 U.S.C. § 521(2) and the Bankruptcy Code's "fresh start" policy. Since the case "turned solely on issues of federal bankruptcy law," the state statute allowing fees was not implicated. *Id.* at 535.

This Court should deny certiorari because the Ninth Circuit decision does not conflict with the decisions of other circuits.

CONCLUSION

For the foregoing reasons, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

TERRY GODDARD
Attorney General of Arizona

MARY O'GRADY
Solicitor General

PAULA S. BICKETT*
Chief Counsel for Civil Appeals

ANTHONY S. VITAGLIANO
Chief Counsel for Tax
Bankruptcy & Collection

DENISE ANN FAULK
Assistant Attorney General

1275 West Washington Street
Phoenix, Arizona 85007
(602) 542-8304
Attorneys for Respondent

**Counsel of Record*

(2)

Supreme Court, U.S.
FILED
JUL 25 2006
OFFICE OF THE CLERK

No. 05-1439

IN THE

Supreme Court of the United States

MARY DEROCHE and ERIC DEROCHE,

Petitioners,

v.

ARIZONA INDUSTRIAL COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

ALLAN D. NEWDELMAN
ROBERTA J. SUNKIN
ALLAN D. NEWDELMAN, P.C.
80 East Columbus Avenue
Phoenix, Arizona 85012
(602) 264-4550

G. ERIC BRUNSTAD, JR.
Counsel of Record
RHEBA RUTKOWSKI
WILLIAM C. HEUER
PETER TOLSDORF
BINGHAM MCCUTCHEN LLP
One State Street
Hartford, Connecticut 06103
(860) 240-2700

Counsel for Petitioners

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONERS 1

A. The Circuits Are Divided Over The Question Presented... 2

B. The Fobian Rule Conflicts With The Bankruptcy Code And With This Court's Precedents... 3

C. This Case Presents An Ideal Vehicle For Resolution Of The Question Presented... 4

CONCLUSION 5

TABLE OF AUTHORITIES

CASES

Butner v. United States, 440 U.S. 48 (1979) 3, 4

Cadle Co. v. Martinez (In re Martinez), 416 F.3d 1286 (11th Cir. 2005) 2, 3

F.D. Rich. Co., Inc. v. United States, 417 U.S. 116 (1974)) 3

Fobian v. Western Farm Credit Bank (In re Fobian), 951 F.2d 1149 (9th Cir. 1991) ..... *passim*

Integrated Solutions, Inc. v. Service Support Specialties, Inc., 124 F.3d 487 (3d Cir. 1997) 4

STATUTES AND RULES

11 U.S.C. § 541 ..... 3, 4

MISCELLANEOUS

5 COLLIER ON BANKRUPTCY, ¶ 541.04 (15th ed. 2006) 4

REPLY BRIEF FOR PETITIONERS

Adhering to its prior precedent, the Ninth Circuit disposed of the DeRoches' claim for attorneys' fees through the application of a single rule of law that it first established over a decade ago: "attorney's fees are not recoverable in bankruptcy for litigating issues 'peculiar to federal bankruptcy law.'" Pet. App. 4a (quoting *Fobian v. Western Farm Credit Bank (In re Fobian)*, 951 F.2d 1149, 1153 (9th Cir. 1991)). Although the Ninth Circuit first applied its *Fobian* rule in the context of a claim for attorneys' fees arising under a contract, and the DeRoches' claim their fees pursuant to a state statute, the Ninth Circuit concluded that this distinction did not matter: "[w]hen, as here, federal and not state law governed the substantive issues involved in the [creditors'] motion, the bankruptcy court should not have awarded attorney's fees pursuant to a state statute." Pet. App. 8a-9a (quotation marks and citations omitted). Accordingly, the Ninth Circuit clearly transferred and applied its *Fobian* rule to claims for attorneys' fees arising under state statutes, reasoning that the source of the entitlement to the fees (contract or state statute) was not important.

Respondent concedes that there is a split of authority among the courts of appeals regarding whether attorneys' fees may be recovered in bankruptcy for litigating bankruptcy issues where the source of the claim is a contract. Pet. Op. 11. Respondent denies, however, that a split of authority exists where the source of the claim is a state statute. Respondent is mistaken. In *Cadle Co. v. Martinez (In re Martinez)*, 416 F.3d 1286 (11th Cir. 2005), in which the debtor succeeded in recovering its attorneys' fees, the source of the litigant's entitlement to fees *was* a state statute. Respondent's attempt to distinguish *Martinez* is unavailing. More important, Respondent fails to explain why it makes a difference whether the particular case involves a claim for fees based on a contract or based on state statute. Under the Ninth Circuit's approach, the analysis is the same, and the conflict among the courts of appeals over the *Fobian* rule clearly encompasses both contractual and statutory entitlements to fees. Because the courts of appeals are divided over the question presented, certiorari is warranted.

Further, the Ninth Circuit's decision in this case conflicts with prior precedents of this Court, and is simply wrong. Under the Ninth Circuit's reasoning, a state cannot direct that its own agency must pay the attorneys' fees of a private citizen when the agency unsuccessfully litigates with the citizen over bankruptcy issues. There is no reason why a state should be prohibited from doing so, and the decision below demonstrates why the *Fobian* rule is unwarranted and inappropriate. Nothing in the Bankruptcy Code directs such a result, and the Ninth Circuit lacked the authority to create such a rule as a matter of general federal common law. Accordingly, certiorari is warranted.

A. The Circuits Are Divided Over The Question Presented.

Respondent concedes that the courts of appeals are in conflict concerning the Ninth Circuit's *Fobian* rule, but argues that the circuit split exists only with respect to the question of recovery of attorneys' fees in bankruptcy where *contracts* are involved, as compared with state *statutes* providing for such a recovery. Pet. Op. 11. Respondent is mistaken.

In *Cadle Co. v. Martinez (In re Martinez)*, 416 F.3d 1286 (11th Cir. 2005), the debtor successfully recovered under a state statute its attorneys' fees incurred in litigating bankruptcy issues in bankruptcy court. The litigation in *Martinez* involved matters of bankruptcy law (the dischargeability of a debt), and no federal statute provided for the debtor's recovery of fees. Nevertheless, the debtor *did* recover its attorneys' fees, based upon a state statute providing that, if one party had a contractual right to attorneys' fees, the other party was deemed to enjoy the same right, if successful in the litigation. 416 F.3d at 1290-91.

Respondent argues that *Martinez* should be viewed as a "contract case" because the state statute at issue required that specific terms be read into contracts under state law. Pet. Op. 11. Far from demonstrating a material distinction, however, Respondent has shown that *Martinez supports* the DeRoches' position here as, absent the state statute in *Martinez*, there would have been no right to recover attorneys' fees. 416 F.3d at 1288-91.

The Ninth Circuit clearly has applied its *Fobian* rule to claims for attorneys' fees incurred in litigating bankruptcy issues when the claim arises as a matter of contract and when it arises by state statute. Other courts of appeals have rejected the *Fobian* rule in both contexts. Because the courts of appeals are plainly divided over the question presented, certiorari is warranted.

B. The Fobian Rule Conflicts With The Bankruptcy Code And With This Court's Precedents.

Respondent argues that the decision below does not conflict with prior decisions of this Court on the theory that, when substantive issues of federal law are involved, an award of attorneys' fees is not available unless federal law affirmatively authorizes the award. In support of this theory, Respondent cites *F.D. Rich. Co., Inc. v. United States*, 417 U.S. 116 (1974). Respondent's reliance on *F.D. Rich*, however, is misplaced.

The State of Arizona has enacted a statute directing that its agencies must pay the attorneys' fees of private citizens when agencies pursue litigation against them and lose. Nothing in the Bankruptcy Code even remotely purports to preempt this rule. Respondent does not contend that any provision of the Bankruptcy Code directs the result reached in this case. Nor does Respondent argue that the result below is necessary to fulfill any essential bankruptcy policy. Rather, Respondent simply asserts that, if federal law is implicated, preemption on the question of attorneys' fees is automatic. But that is not the law generally, and it is especially not the law under the Bankruptcy Code.

Respondent ignores, for example, section 541 of the Bankruptcy Code (preserving the debtor's rights for the benefit of the bankruptcy estate) and the extent to which bankruptcy law preserves a debtor's state law entitlements unless *expressly* displaced. *See* 11 U.S.C. § 541. As this Court has explained in the bankruptcy context, "[p]roperty interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed any differently simply because an interested party is involved in a bankruptcy proceeding." *Butner v. United States*, 440 U.S. 48, 55 (1979). The Court has further instructed that

bankruptcy courts should endeavor to "ensure that the [party] is afforded in federal bankruptcy court the same protection he would have under state law if no bankruptcy had ensued." *Id.*; *see also Integrated Solutions, Inc. v. Service Support Specialties, Inc.*, 124 F.3d 487, 490-91 (3d Cir. 1997) ("As the legislative history for [section 541] specifies, 'The scope of this paragraph is broad. It includes all kinds of property, including tangible and intangible property, causes of action . . . and all other forms of property currently specified in section 70a of the Bankruptcy Act . . . .'") (citations omitted); *see also* 5 COLLIER ON BANKRUPTCY ¶ 541.04 (15th ed.) ("Paragraph 1 [of section 541(a)] is broad. It includes all kinds of property, including both tangible and intangible property, causes of action, and all other forms of property.").

Viewed in this light, Respondent's citation to sections of the Bankruptcy Code that specifically authorize awards of attorneys' fees in bankruptcy proceedings as a matter of federal law does not support the conclusion that these are the *only* instances in which fees may be awarded. The fact that Congress authorized the award of attorneys' fees in certain contexts merely supplements other authorization where, as here, the Bankruptcy Code generally preserves non-bankruptcy entitlements to fees.

C. This Case Presents An Ideal Vehicle For Resolution Of The Question Presented.

Respondent does not deny that the Ninth Circuit resolved the DeRoches' claim for attorneys' fees exclusively as a matter of law. Nor does Respondent deny that resolution of the question presented is outcome-determinative. The question presented involves an important and recurring issue. Accordingly, Petitioners respectfully request that the Court issue a writ of certiorari to review the decision of the court below.

CONCLUSION

For the foregoing reasons, the DeRoches respectfully request that the Court issue a writ of certiorari in this case.

Respectfully submitted,

G. Eric Brunstad, Jr.
Counsel of Record
Rheba Rutkowski
William C. Heuer
Peter Tolsdorf
BINGHAM MCCUTCHEN LLP
One State Street
Hartford, Connecticut 06103
(860) 240-2700

Allan D. NewDelman
Roberta J. Sunkin
ALLAN D. NEWDELMAN, P.C.
80 East Columbus Aveune
Phoenix, Arizona 85012
(602) 264-4550

Counsel for Petitioners

Dated: July 25, 2006